IN THE
SUPREME COURT OF THE UNITED STATES

NO. 79-775

ARVIS E. WHITMAN, SHERIFF,
BIENVILLE PARISH,

Applicant

versus

MACK W. FORD,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI REQUESTED BY APPLICANT

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STATUTES

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court committed error in finding a violation of the Civil Rights Acts, and specifically 42 U.S.C.A. §1983, et seq.

2. Whether the District Court erred in awarding damages, punitive or otherwise, plus attorneys fees and court costs.

STATEMENT OF THE CASE

This action was a suit for punitive

and compensatory damages, plus attorneys fees, for violations of plaintiff-respondent's civil rights on December 22, 1975, arising specifically from a beating suffered by plaintiff-respondent at the hands of defendant-applicant in his capacity as Sheriff of Bienville Parish, Louisiana. Suit was filed on November 11, 1976, and plaintiff's complaint was allowed amended on September 12, 1977, to conform to the evidence and to pray for attorneys fees as part of the costs of the action. After normal, appropriate, pre-trial proceedings, trial was held before the Honorable Tom Stagg, District Judge, on November 14, 1977. After hearing the evidence, and after giving oral reasons therefor, Judge Stagg found for plaintiff, Reverend Mack Ford, and against Arvis Whitman, awarding $4,000.00 as damages plus a reasonable attorneys fee and all costs. On October 23, 1978, Judge Stagg fixed the award of attorneys fees at $2,000.00 plus expenses of $600.26. An appeal ensued, and by opinion dated August 14, 1979, the trial court's decision was affirmed.

As noted in the application of Whitman, there is agreement as to plaintiff's arrest on December 22, 1975, his release on bond his return to the Sheriff's office as directed by members of the Sheriff's department, and the beating which plaintiff suffered in the Sheriff's office. The sole factual issue before this court relating to liability is that of whether the beating administered by Whitman was a mere personal matter or whether it was done under color of

law, and, therefore, whether the damages awarded were proper under these circumstances.

SUMMARY OF THE ARGUMENT

1. As to Whitman's assertion that the beating was a personal matter and not under color of law, respondent, Ford, shows that applicant's assertions in this regard are in error and are in conflict with classic and well-settled areas of civil rights law. Analyzing the facts, and findings as made by the District Judge, it is clear that the "color of law" requirements are met in the case at bar.

2. As to Whitman's assertion that the District Judge erred in awarding punitive damages to Mack Ford, this, too, is in error and in clear conflict with settled law.

3. As to Whitman's assertion that punitive damages were not appropriate on the facts of this case, respondent suggests that if, indeed, this case is an inappropriate one for an award of punitive damages, then, indeed, the intent and spirit of the Civil Rights Acts are violated. It is suggested that applicant's argument here, too, flies in the face of established and settled jurisprudence.

ARGUMENT

I. "COLOR OF LAW" AND LIABILITY

At the outset, respondent suggests that the briefness of the text of applicant's application in this court points to the overall weakness of his arguments in the case at bar. Applicant has sought to allege throughout this matter, and even in the trial court, that the events between Ford and Whitman on December 22, 1975, were merely personal. On this basis, Whitman seeks to slip out from under the umbrella of protection provided for Reverend Ford by way of the Civil Rights Acts, and particularly 42 U.S.C.A. §1983. Yet this logic and its after-the-fact assertion flies directly in the face of the overwhelming weight of evidence presented at trial. Respondent, Ford, concedes that the ambit of protection in the Civil Rights Acts does not apply to everyone, but rather only applies to those acting "under color of law". Applicant, in citing the Carter case (Application, p.16) suggests that, indeed, purely private conduct is outside of the protection. As a point of law this is generally correct. However, it is to be pointed out that the Carter case stated this only in dicta since the principal issue there was whether §1983 applied as to the District of Columbia. This Honorable Court does note in the opinion that generally the "Fourteenth Amendment itself erects no shield against merely private conduct however discriminatory or wrongful," District of Columbia v. Carter, 409 U.S.

418 at 423, 93 S.Ct. 602 at 606, 34 L. Ed.2d 613 (1973). Likewise, the court concludes, §1983 is limited in a similar fashion. In discussing the Fourteenth Amendment limitations, the court cites prior actions, (93 S.Ct. at 606, herein omitted) which discuss the nature of private conduct which has been deemed to be outside of the Amendment's protection. Yet even a cursory analysis of the Carter case and the cases cited therein reflects no factual situation similar to the case at bar. Where, in the cases cited in Carter, no liability (or Civil Rights jurisdiction) was found, the persons involved were indeed private individuals, and not, as here, public officials acting within the confines and scope of their offices.

In effect, then, applicant, Whitman, without saying so, has sought to allege that Sheriff Whitman did not act under color of law as he abused Reverend Ford. As summarized by the Seventh Circuit in Roberts v. Acres, 495 F.2d 57 (7th Cir., 1974), the "color of law" requirements of the Civil Rights Acts are as follows:

> [F]or an individual's conduct is engaged in under color of state law if clothed with the authority of the state and purporting to act thereunder, whether or not the conduct complained of was authorized or, indeed, even if it was proscribed by state law. (Citing Monroe v. Pape, 365 U.S. 167, 187, 81 S.Ct. 473, 5 L.

Ed.2d 492 (1960); Screws v. United States, 325 U.S. 91, 111, 65 S.Ct. 1031, 89 L.Ed. 49 (1946).

Put another way:

> [M]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action taken 'under color of' state law. Monroe v. Pape, 365 U.S. at 184, 81 S.Ct. at 482; see also Baldwin v. Morgan, 251 F.2d 780 (5th Cir., 1958).

Analyzing the facts of the case at bar, as elicited during trial, the following indicia make it clear that, indeed, Sheriff Whitman acted "under color of" state law when he struck Reverend Ford. [The following references are to pagination in the appendix]. At App. 78, on cross-examination Sheriff Whitman admitted that, on the evening in question, he was in his office at the Bienville Parish, Louisiana, Courthouse. He was in his sheriff's uniform. He personally took the action to have Reverend Ford recalled to the courthouse for a bond fixing. He met Reverend Ford in the hallway (App. 79) and told (App. 81) Reverend Ford to enter the Sheriff's private office. Acceding to the Sheriff's recognized and ostensible authority, Reverend Ford did so. (App. 81, 97). At this

point, it is important to note that the sole reason Sheriff Whitman gave at trial for needing to see Reverend Ford was his anger over a comment allegedly made to ex-defendant Andy Tolbert during Sheriff Whitman's prior election campaign. In fact, the evidence reflects that Reverend Ford was a supporter of Sheriff Whitman's opponent in that election. (App. 81-83, 99). Once again, Reverend Ford admitted at trial that he had opposed Sheriff Whitman in that election and, more importantly, that at least in part his opposition was based upon his belief in certain misconduct of Sheriff Whitman's. (App. 102). Reverend Ford did not resist (App. 90) but, rather, showed the respect he should show for authority (App. 104-105). Finally, Reverend Ford confirmed that he considered the matter official because of the incidents of Sheriff Whitman's office as seen through Reverend Ford's eyes on that night (App. 130-131). Rhetorically it may be added, "Need more be said?"

Yet, despite all of these strengths, Sheriff Whitman still seeks to find sanctuary in his allegation of "purely private" conduct. It is respectfully submitted that, in view of Sheriff Whitman's admitted and ostensible official conduct, he clearly acted under color of state law as he maliciously and deliberately struck Reverend Ford. His conduct indeed borders on attempted intimidation since the brunt of Sheriff Whitman's objections on that night were aimed at the cessation of what must be considered as fair political

comment made during an election campaign. In this regard, Exhibit P-1 is important because it provides the basis--a fair basis--for that political comment in the public arena. So, too, in this case is the necessity for protection of open ideas and free speech to be protected within the ambit of Federal Civil Rights. See New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

As amply set forth in Monroe v. Pape, supra, the federal courts sit as a watchdog over the civil rights of individuals at the hands of state officials. His Honor, Judge Stagg, affirmed that principle in his reasons for judgment. He made specific factual findings and found sufficient indicia in the evidence to conclude that Sheriff Whitman acted under color of state law. When all of the foregoing argument is analyzed, only one simple phrase can properly sum up the conclusions he reached and the judgment he rendered--he was right.

II. DAMAGES

Although broken down into sub-issues, the issues relating to damages may be properly treated together for purposes of argument.

Applicant, Whitman, in brief, sets forth his third issue as "The District Court erred in awarding what amounts to punitive damages." Yet, in argument at p.24, applicant concedes that punitive

damages may indeed be awarded in appropriate cases.

Even a most cursory review of the Federal jurisprudence can leave no doubt that, indeed, both compensatory and punitive damages are recoverable under the Civil Rights Acts of 1871 and, particularly, under 42 U.S.C., Sections 1981, 1982, 1983 and 1988. Nevertheless, applicant's position is that punitive damages would not be allowable in this case even if his liability under the Civil Rights Acts were established at trial. It must be surmised that the only possible basis for defendant's position is in the old adage that punitive or exemplary damages are not allowed in Louisiana in civil cases. See, for example, Baggett v. Richardson, 473 F.2d 863 (5th Cir., 1973). But compare Loeblich v. Garnier, 113 So.2d 95 (La. App. 1st Cir., 1959) at 103. It is particularly interesting that applicant cites to this court a case dating from 1917 to support his position, thus ignoring a quite large expansion of the jurisprudence since that time! See Fagot v. Ciravola, 445 F.Supp. 342 (E.D. LA 1978). (Allowing of punitive damages against a defendant police department in Louisiana.) Applicant unfortunately overlooks a uniform federal interpretation which has been given to the Civil Rights Acts at issue in this case.

In Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), Justice Brennan well stated in his concurring opinion the scope of protection

provided by 42 U.S.C. §1983 as follows:

> Section 1983 in effect authorizes the federal courts to protect rights 'secured by the Constitution and laws' by invoking any of the remedies known to the arsenal of the law. Standards governing the granting of relief under §1983 are to be developed by the federal courts in accordance with the purposes of the statute and as a matter of federal common law (citations omitted). Of course, where justice requires it, federal district courts are duty-bound to enrich the jurisprudence of §1983 by looking to the remedies provided by the States wherein they sit. 42 U.S.C. §1983. But resort to state law as such should be had only in cases where for some reason federal remedial law is not and cannot be made adequate to carry out the purposes of the statute. 398 U.S. at 231, 90 S.Ct. at 1641.

Likewise, the United States Fifth Circuit Court of Appeals has succinctly stated:

> It [42 U.S.C. §1983] also permits damages including punitive damages, Mansell v. Saunders, 372 F.2d 573 (5th Cir., 1967) at 576.

Compare Silver v. Cormier, 529 F.2d 161 (10th Cir., 1976) at 163 and cases cited therein.

And, finally, combining §1983 with §1988 of the same title, the rule is to simply apply both federal and state rules on damages, "whichever better served the policies expressed in the federal statutues," Sullivan v. Little Hunting Park, 396 U.S. 229 at 240, 90 S.Ct. 400 at 406, 24 L. Ed.2d 325 (1969). Sullivan further provides that the rule of damages, including compensatory damages, regardless of source, is a federal rule to respond to the need when a federal rule is impaired. Even in the decisional law in the courts of the United States in Louisiana this is now clear (Fagot v. Ciravola, supra). It is suggested that in this case as well, the federal rule of punitive damages was properly invoked to protect those rights of respondent intended to be protected through the very existence of the Civil Rights Acts.

Assuming, therefore, that punitive damages are authorized in a §1983 action generally (and in Louisiana), some attention to the application of the rules of damages generally is in order. At the outset,

> Compensatory damages awardable in a §1983 case are not limited

> to the out-of-the-pocket pecuniary loss the plaintiffs suffered. They can be awarded for emotional and mental distress even though no actual damages are proven. (citations omitted) Punitive damages may also be awarded in civil rights actions where the defendant exhibits oppression, malice, gross negligence, willful or wanton misconduct, or a reckless disregard for the civil rights of the plaintiff (citations omitted), Guzman v. Western State Bank of Devils Lake, 540 F.2d 948 (8th Cir., 1976) at 953.

Returning once again to Justice Brennan in Adickes,

> [To recover punitive damages], it is sufficient for the plaintiff to show either that the defendant acted 'under color of [a] statute, ordinance, regulation, custom or usage of any State or Territory', with actual knowledge that he was violating a right 'secured by the Constitution and laws' or that the defendant acted with reckless disregard of whether he was thus violating such a right, 398 U.S. at 233, 90 S.Ct. at 1642.

In the same vein of jealously protecting the federally created rights involved in civil rights actions, federal law is deemed to permit an award of punitive damages even though there is an absence of actual loss to the plaintiff, Spence v. Staras, 507 F.2d 554 (7th Cir., 1974) at 558. Finally, as stated in Lee v. Southern Home Sites Corporation, 429 F.2d 290 (5th Cir., 1970), and reiterated in Gill v. Manuel, 488 F.2d 799 (9th Cir., 1973) at 801:

> The allowance of such damages [referring to punitive damages] inherently involves an evaluation of the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent.

Given the language and policies set forth in Lee v. Southern Home Sites Corporation, supra, it is respectfully submitted that, indeed, this case was an appropriate case for both compensatory and punitive damages. Analyzing the facts in the Lee fashion, it can easily be concluded that because of Sheriff Whitman's obvious deliberate, wanton and malicious conduct, pecuniary punishment may be wise. Or, it may be also easily said that some form of deterrent was deemed necessary by the trial court. To repeat, it is for these very reasons that the court said in Lee:

> Therefore, the infliction of such damages, and the amount thereof when inflicted, are of necessity within the discretion of the trier of fact. 429 F.2d at 294.

Further, in his arguments on damages, applicant seeks to show that Reverend Ford and not Sheriff Whitman was the offending party! In view of the suggestions made herein (supra) that Reverend Ford's comments made several months earlier, during a political campaign clearly constitute fair political commentary, applicant's allegations will not be further addressed except as to authorities cited by him.

Pritchard v. Perry, 508 F.2d 423 (4th Cir., 1975) cited by applicant does state, in dicta, the proposition for which the case was cited by applicant. However, applicant fails to point out the distinguishing language of the same paragraph, 508 F.2d at 426:

> But an individual, not under the disability of prison confinement, on the contrary, has an 'incontrovertible' right--a right always 'of constitutional dimensions' to be free from unreasonable interference by police officers and to enjoy 'security from arbitrary intrusion by the police.'

The proposed application of Pritchard suggested by applicant is inaccurate since Pritchard was not a case dealing with an award after trial on the merits but rather was a decision reversing a dismissal of the action for lack of a cognizable action under the Civil Rights Acts.

Likewise, Stolberg v. Members of the Board of Trustees for State Colleges of Connecticut, 474 F.2d 485 (2d Cir., 1973) does not support applicant's position. There, a professor was discharged for the exercise of protected First Amendment rights. Suit followed, but at trial, the district judge found specifically that the professor did not sustain any evidence of pain and suffering or damage to reputation. Likewise, for policy reasons, (474 F.2d at 489), the trial judge did not believe punitive damages were necessary to secure compliance with constitutional requirements and such an award might even have been detrimental to the public. Thus, in fact, the Stolberg case merely is another circuit's reaching the same conclusion reiterated, supra, in Lee. That is, where there is support in the record for a trial judge's discretion, it will not be disturbed on appeal. cf. Stolberg, 474 F.2d at 489.

James v. Lusby, 499 F.2d 488 (D.C. Cir., 1974) is entirely distinguishable from the facts at bar. There is no evidence that Reverend Ford did anything outside of the range of proper conduct. He shouted no

obscenities at the Sheriff and, by the Sheriff's own admission, he did not resist applicant's attack.

Finally, applicant cites Caplin v. Oak, 356 F.Supp. 1250 (S.D. N.Y. 1973). Since the case involved a situation involving the outright dismissal of plaintiff's complaint, the language of the case stands only for the proposition that there must be some showing of bad faith or indication of deterrent impact to warrant punitive damages. Here, unlike in Caplin, the District Judge made specific findings in his oral reasons for judgment (App. 199-201) which point clearly to his reasons for granting the damages stated herein, and which constitute an adequate and viable evidentiary basis for the trial court's decision. His discretion, having been soundly and wisely exercised, should not be disturbed.

Because of what respondent believes is a clear case of liability, it is respectfully submitted that, at the conclusion hereof, respondent is entitled to a further reasonable award of attorneys fees encompassing work in conjunction with Whitman's writ application, and, pursuant thereto, this Honorable Court should remand this cause for purposes of fixing said additional fees.

CONCLUSION

For the foregoing reasons, it is

respectfully submitted that the decision of the District Court as affirmed should be affirmed insofar as that decision awards damages, costs and attorneys fees, and included should be an additional reasonable award of attorneys fees encompassing work in conjunction with this writ application, and further this Court should remand this cause for purposes of fixing said additional fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Brief has been served upon the following persons by placing a copy of same in the mail, postage prepaid:

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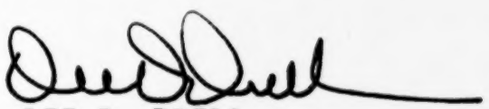

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